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Attorney for
Arizona Bar No. 005627

IN THE SUPREME COURT

OF THE UNITED STATES

JAMES C. DUNKEL, Petitioner, vs. UNITED STATES OF AMERICA, Respondent.	INDEX NO. 90-142 PETITIONER'S MOTION TO CONSOLIDATE

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COMES NOW JAMES C. DUNKEL (PETITIONER), pursuant to Rule 21(c) of the Supreme Court, and hereby moves this Court for an order consolidating the above captioned case with Cheek v. U.S., Index No. 89-658, cert. granted, 110 S.Ct. 1108 (1990).

I. GROUNDS FOR THE MOTION

A. Both cases raise an identical question in a criminal tax case where willfulness is an essential element of the crime: i.e., whether willfulness may be negated by a good faith misunderstanding of the law only if the asserted belief is objectively reasonable.

B. Both cases originate and involve an appeal from decisions out of the Seventh Circuit: see U.S. v. Cheek, 882 F.2d 1263, 1269 (7th Cir. 1989), cert. granted 110 S.Ct. 1108

(1990), Index No. 89-658; U.S. v. Dunkel, 900 F.2d 105 (7th Cir. 1990) (petition for writ of certiorari filed July 16, 1990, Index. No. 90-142).

C. Because of the identical issue raised by way of Cheek and PETITIONER, judicial economy and time will be conserved by consolidating the cases for argument.

II. MEMORANDUM OF POINTS AND AUTHORITIES

A. Overview

On May 25, 1990, PETITIONER'S Application for Stay of the Seventh Circuit's Mandate was granted by this Court. See PETITIONER'S Petition for Writ of Certiorari, Index No. 90-142, Appendix E incorporated herein by reference.

The GOVERNMENT did not oppose PETITIONER'S Application for Stay of Mandate because the Petition for Writ of Certiorari would present the identical question upon which this Court granted certiorari in Cheek: "whether in a prosecution for willful violation of the criminal tax laws, may the district court properly instruct the jury that a good faith misunderstanding of the law negates willfulness only if that misunderstanding was objectively reasonable?" See letter of May 24, 1990 from Solicitor General attached as EXHIBIT A. Therefore, judicial effort and other economies will be likely effected by consolidating the cases for argument.

B. Statement of Facts

1. This Court granted certiorari in the case of Cheek v. U.S., supra. Cheek raises the question: in a criminal tax case, may willfulness be negated by a good faith misunderstanding of the law only if the asserted belief is

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objectively reasonable.

2. PETITIONER'S Petition for Certiorari, supra, has raised the identical issue under almost identical facts.

3. The RESPONDENT in reply to PETITIONER'S Application for Stay of Mandate filed with this Court, did not oppose the application, because PETITIONER'S Petition for Writ of Certiorari would present the same question on which this Court granted certiorari in Cheek. See EXHIBIT A.

4. Because PETITIONER and Cheek both raise an identical issue now pending before this Court, the cases should be consolidated for reasons that this Court will conserve its time and effort.

WHEREFORE, for reasons previously discussed, PETITIONER prays that this Court grant his motion and consolidate the cases for briefing and argument.

DATED this 2nd day of August, 1990.

MacPHERSON & McCARVILLE, P.A.

By /s/
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CERTIFICATE OF SERVICE

JAMES C. DUNKEL, Petitioner,
vs.
UNITED STATES OF AMERICA, Respondent.

CASE NO. 90-142

The undersigned hereby certifies that a true and correct copy of PETITIONER'S Motion to Consolidate has been served on all parties required to be served by mailing, postage prepaid, in the United States Mail this 2 day of ~~July~~ August, 1990 to:

Kenneth W. Star
Solicitor General
Department of Justice
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Washington, D.C. 20530
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U.S. Department of Justice
Office of the Solicitor General

Washington, D.C. 20530

May 24, 1990

Honorable Joseph F. Spaniol, Jr.
Clerk
Supreme Court of the United States
Washington, D.C. 20543

MAY 25 1990

Re: Dunkel v. United States, No. A-819

Dear Mr. Spaniol:

The government does not oppose the application for a stay of the mandate of the United States Court of Appeals for the Seventh Circuit in this case, pending the filing and disposition of a petition for a writ of certiorari. Petitioner asserts that he intends to file a petition for a writ of certiorari and that he intends to present the question on which the Court has granted certiorari in Cheek v. United States, 110 S. Ct. 1108 (1990): whether in a prosecution for willful violation of the criminal tax laws, the district court may properly instruct the jury that a good faith misunderstanding of the law negates willfulness only if that misunderstanding was objectively reasonable. Based on those representations, the government does not oppose the application for a stay of the mandate.

Sincerely,

Kenneth W. Starr
Solicitor General

cc: Donald W. MacPherson, Esquire
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Exhibit "A"